United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

945

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23521

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH WINSTON DIVERS,

Appellant.

Appeal from the United States District Court
for the District of Columbia

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Washington, D. C. 20036
296-8880

Cr. No. 365-69

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ISSUES PRESENTED *

In the opinion of the Appellant the following issues are presented:

I. Whether the Trial Court erred in its instruction to the Jury on the law applicable to assessing the credibility of witnesses.

II. Whether the Trial Court erred in its instruction to the Jury on the law of circumstantial evidence.

III. Whether the Trial Court erred in its instruction to the Jury on the law relative to "alibi defense" and the evaluation of "alibi witnesses."

IV. Whether the Appellant was deprived of due process where he was identified by photographs and no hearing was held by the Trial Judge on the issues of suggestive circumstances and admissibility in evidence.

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* This case has not previously been before this Court.

SUMMARY OF PROCEEDINGS

The Appellant was charged with violation of Title 22, Sections 2901 and 502 of the D.C. Code, 1967 edition, Robbery and Assault With a Dangerous Weapon, in an indictment filed in the Court below in Criminal No. 365-69.

The Indictment was drawn in four counts, the first two counts of which charged the offenses of robbery and assault committed upon one Beverley West while the third and fourth counts charged similar offenses committed upon one Brenda Howard. The date of the commission of the foregoing offenses was January 16, 1969, opposite 733 Euclid Street, N. W., Washington, D.C.

After a two-day trial beginning June 23, 1969, before the Honorable June L. Green, presiding, the Jury returned a verdict of guilty on all four counts on June 24, 1969.

That thereafter Appellant seasonably filed his Notice of Appeal and Application for Transcript at the expense of the United States, and to proceed in forma pauperis. That the same were granted by orders of the Court dated April 22, 1969, and September 3, 1969.

EVIDENCE RELEVANT TO QUESTIONS PRESENTED ON APPEAL

Preliminary to the commencement of the Trial, Counsel for Defendant addressed the Court as follows: "Your Honor, it has come to my attention through information that the Defendant has given me that I request a Wade-Stovall hearing may be appropriate at this time." Counsel further addressing the Court, stated: "Your Honor, it has come to my attention that the Defendant is personally known to one of the police officers who has been identified as a witness and as that bears on the two occasions on which photographs were shown to the complaining witnesses, we would at least like the opportunity to question that particular police officer and the two complaining witnesses, in an effort to determine whether they were aided or assisted in picking out the Defendant." (Tr. 7).

The Court in denying Counsel's request, ruled as follows: "The Court: The Court will permit you to go into all of those things then at the time they are before the Jury. If it should turn out that it is not as indicated by Mr. Green, then, of course, the Court would have to rule on it at that Time." (Tr. 7-8).

Thereafter, Beverley West was called as a witness by the Prosecution, and in so far as her testimony is relevant to the issues presented on appeal, she testified substantially as follows: That she and Brenda Howard were walking from the

Meridian Hill, an off-campus dorm, to Howard University, about 10:30 p. m. on January 16, 1969. That when they had reached a point opposite 733 Euclid Street, N. W., she heard someone running. That she turned around and saw a man stop. That after taking about three steps the man came behind her and placed his hand over her mouth and a gun at her head. The man said he did not want to hurt them but he wanted their money. That he pushed them over to the steps in front of the house. That they gave him what money they had which was a total of about $5.50. That the man was about 5 ft. 9 inches, weighed about 145 pounds, brown skin, had a strong chin, thin mustache and that he was wearing a small African bush. That the man wore brown shoes, brown pants and a gold wind breaker. That she hollered and the man struck her twice in the face. (Tr. 11-13)

That the next day she saw Officer Shalar Woods, whom she knew, and that she told her story to the Officer. That she and her fiance went along with Officer Woods to No. 10 Precinct, where the Officer took her downstairs to the Photography Room and showed her a stack of pictures and a scrap book of pictures. The witness proceeded to go through the single pictures first and there she saw the picture of the person that had robbed her. (Tr. 15-16).

That thereafter the witness went down town, where she swore out a warrant for the arrest of one Anthony Divers. That around January 21, 1969, she went to the lineup, where she viewed the lineup which included the appearance of Anthony Divers but

she could not identify anyone in the lineup who had robbed her. (Tr. 17).

That thereafter Officer Smith contacted the witness and asked that she come to the No. 6 Precinct and that when she got there she went down to the Photography Room where she was shown some pictures. That they asked the witness whether she recognized the person that robbed her from any of the pictures which she had examined and she said "I saw one and I was almost positive except for the fact that there was a scar on the face of the person." (Tr. 18). The witness was shown three pictures while she was at No. 6 Precinct. (Tr. 20).

Following the witness' visit to the No. 6 Precinct she was again taken downtown, where she swore out a warrant for the arrest of the Defendant, on or about January 29, 1969. That thereafter the witness appeared at the lineup for the second time, and on this occasion she identified the Defendant as the person who had robbed her. That the Defendant was the No. 1 person in the lineup, reading from left to right. (Tr.23). The witness made a Court room identification of the Defendant. (Tr. 24).

On Cross-examination the witness stated that her reason for not having reported the robbery until the next day, was because she was upset. That Officer Woods was with her when she made the picture identification at No. 10 Precinct. That Offier Woods and her fiance were schoolmates. (Tr. 27). That she did not notice a scar on the face of the man who robbed her. (Tr. 29).

Thereupon Brenda Howard was called as witness for the Prosecution, and in so far as is pertinent to the issues presented on this appeal, she testified substantially as follows: That about 10:30 p.m. of January 16, 1969, she, in company with Beverley West, was walking from 2601 16th Street, N.W. to Howard University campus and that when they had reached a point "right off Georgia on Sherman" they were stopped and robbed. (Tr.32). That a man put his hand over Beverley's mouth and a gun to her head and said: "This is a robbery. Give me your money." That she opened her wallet and offered to give him the money and he said "No, not here," and "pushed us over to the steps in front of the house." That the man told them to sit down. That while they were sitting, he said "give me your money." That she gave him $2.00 and some change.

That she saw his full face. (Tr. 33). The witness made court room identification of the Defendant. (Tr. 35).

That thereafter she was shown pictures by the District Attorney and she identified a picture of the Defendant. That thereupon she visited the lineup and picked the Defendant, from those in the lineup, as the person who robbed her. (Tr. 37).

The Defendant was placed No. 1 in the lineup, the position which he held in the lineup at the time he was identified by witness Beverley West. (Tr. 23, 38).

On cross-examination when asked who requested her to come down and view the pictures, the witness replied: "I don't remember. I guess it was the officer in charge. I don't remember." (Tr. 40).

That she knew Miss West had been down once before to view the pictures. (Tr. 4). That Miss West accompanied her when she viewed the picture. (Tr. 41).

That Miss West preceded the witness in viewing the lineup.

That Miss West told her that it was the brother of the Defendant in the first lineup and not the Defendant. (Tr. 42).

Whereupon, Officer Shalar L. Woods was called as a witness by the Prosecution, and in so far as is material to the issues presented on this appeal, he testified substantially as follows: That he was a member of the metropolitan police force, assigned to the mobile unit, Tenth Precinct. That he knew the complaining witness, Beverley West and her fiance.

That on January 17, 1969, he was approached by a schoolmate, the fiance of Miss West, who stated that she was robbed the night before. The witness asked her whether she wanted to make a formal report to the police and she stated no. That he then asked her did she wish to make a report of such act to the police and she said yes. That thereupon he took her to No. 10 Precinct. That at No. 10 Precinct they went down to the vice room where photographs of people in the Tenth Precinct area were kept. That he gave her photographs of some fifty different people and Miss West picked out the photograph of Anthony Divers, as the person who had robbed her. (Tr. 43-44).

That thereupon the witness took Miss West down to the D. C. Court of General Sessions, where she swore out a warrant

for the arrest of Anthony Divers. That after the warrant was issued the witness had no further participation in the case. (Tr. 45-46).

On cross-examination Officer Woods admitted that he knew the Defendant that he "used to see him around where he used to stand around and talk and around the school and football games." (Tr. 48).

Whereupon Officer Gary F. Smith was called and a witness by the Prosecution, and in so far as his testimony was relevant to the issues presented on this appeal, he testified substantially as follows: That he was a police officer assigned to No. Six Precinct.

That he arrested Anthony Frank Divers on a U. S. Warrant for robbery. That the latter is the Defendant's brother. That Anthony Frank Divers was placed in a lineup on January 21, 1969. That Miss Beverley West came down to view the lineup but she was unable to identify Anthony Frank Divers as the person who had robbed her. (Tr. 52-53).

That thereafter the officer obtained 8 mug shots, 'ID' pictures from the 'ID' Bureau, one of which was of the Defendant. That the witness met with Miss West January 25, 1969, in the basement of the Sixth Precinct and she viewed 8 'ID' pictures. That she hesitated on the picture of the Defendant. That she went through the rest of the pictures and "then she came back to the picture of the Defendant and she said that she thought it was him, but she could not be sure "because there was a scar on

the . . . visable in the picture on the forehead of the subject in the picture" which she did not remember from the night of the robbery. That the picture to which Officer Smith referred was Government Exhibit "1-A". (Tr. 54).

Officer Smith further testified that: "On the morning of the 27 (Jan.) I met Miss West and Miss Howard in the United States Attorney's Office at the Court of General Sessions and in the presence of Assistant United States Attorney Ackerman the pictures were shown to Miss Howard, all eleven pictures together."

That thereafter an arrest warrant was secured for Joseph Winston Divers. That a lineup was held on February 4, 1969, in which the Defendant appeared.

That both Miss West and Miss Howard viewed the subjects in the lineup. That the Defendant was the No. 1. subject in the lineup and that both Miss West and Miss Howard identified the Defendant as the person who had robbed them. (Tr. 57).

Thereupon the Government offered in evidence Government's Exhibits 1-A through 1-H, 2-A through 2-C and 3. At this point Counsel for the Defendant objected to the admission in evidence of the said Exhibits and stated the following reasons for such objection: "My reasons on the objection are to the introducing of these two, Government's 1-A and 2-A -- that there has been some testimony on the part of Government witnesses that the Defendant had been known to them prior to this particular offense and possibly known personally to the officer first obtaining a warrant based on the identification of Joseph Divers and listed as Anthony Divers, at the Tenth Precinct, and the

basic objection to the introduction of these two is that the identification has been tainted by the prior knowledge on the part of the police officers and some communication with the complaining witnesses." (Tr. 64).

The Trial Court overruled the foregoing objection. (Tr. 66). The Prosecution concluded its case in chief against the Defendant with the testimony of Officer Smith.

Thereupon Counsel for Defendant moved the Court for a directed verdict for the failure of Government to prove a prima facie case. The Trial Court overruled the said motion. (Tr.67).

Whereupon, in order to sustain the defense of alibi, the Defendant called as his first witness, Rosina Crosby, who upon being first duly sworn, testified substantially as follows: That she was a sister of the Defendant, that they live at 17 Sherman Circle, N.W., that on the night of January 16, 1969, she saw the Defendant at home about 7:30 p.m. before she left for the theater and she saw him around 10:30 p.m. at home, when she returned from the theater. (Tr. 69).

That thereafter Rosina E. Minor was called as a witness for the Defendant, and testified substantially as follows: That she lives at 17 Sherman Circle, N.W., that she is the grandmother of the Defendant, that the Defendant also lived there "until he was taken away," that the Defendant was at home on the night of January 16, 1969. That he went around to a friend's house around 6:00 p.m. but he was back in the house by 7:30 p.m. and that he was still in the house shortly before 11:00 p.m. when she went to her room for the night. (Tr. 85-86).

That thereafter Anthony Frank Divers was called as a

witness for the Defendant and he testified substantially as follows: That he lives at 17 Sherman Circle, N.W., and is the older brother of the Defendant, that he remembers the date of January 16, 1969, because he was arrested and wrongfully charged with having committed a robbery on that date. That he is employed and on said date he left work at 4:30 p.m. and went directly to 806 Decatur Street, N.W., the home of his brother-in-law. That he arrived at 17 Sherman Circle around 10:30 p.m. and when he arrived there his brother, the Defendant, was there. That the Defendant opened the door for him. (Tr. 97-98).

That he was arrested on January 17, 1969, and charged with the robbery of the West and Howard women.

That thereafter Sterling N. Crosby was called as a witness for the Defendant, was examined and testified substantially as follows: That he lived at 806 Decatur Street, N.W., that the Defendant was his brother-in-law, that he particularly remembered the day of January 16, 1969, because "Friday the 17th, they locked my brother-in-law up at my house". That he saw the Defendant on January 16, 1969. That the Defendant came to his home "between 6:30 and a quarter to 7:". That the Defendant was in the living room when the witness came home. That the witness spoke to the Defendant and proceeded upstairs. (Tr. 109).

Thereupon the Defendant, Joseph Winston Divers was called as a witness in his own defense and testified substantially as follows: that he lives at 17 Sherman Circle, N.W., that on January 16, 1969, he was home between 5:30 and 6:00 p.m., that sometime after 6:00 p.m. he took a bath and dressed and went

down to his brother-in-law's house. That he went there looking for his brother, who had his dress shoes, that he did not find his brother at 806 Decatur Street, N.W., and after waiting there about 45 minutes he returned to 17 Sherman Circle, N.W., that after he got home he received a phone call from a young lady he was to take out that night but he had to cancel the date because he could not find his brother. That the young lady's name was "Joanne Orr". (Tr. 116-117). That thereafter he remained at home and talked on the telephone. That he saw his brother around nine o'clock at home. That he saw his sister, Rosina Crosby, around 10:30 p.m. when she returned home. That it was around 11:30 p.m. when he finished his telephone calls. That he has lived in the District of Columbia for twenty years. That the number of blocks from 17 Sherman Circle, N.W. to Georgia Avenue, and Euclid Street would be a good 25 blocks. That he had known Officer Woods since 1965. (Tr. 121).

Whereupon at the conclusion of all of the evidence the Defense renewed its motion for acquittal. The Trial Court denied Defense's motion for a Judgment of Acquittal. (Tr. 139).

ARGUMENTS

I

During the course of the proceeding Arguments, wherever relevant, the Appellant invokes the discretion of this Court pursuant to the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure.

THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE LAW APPLICABLE TO ASSESSING THE CREDIBILITY OF WITNESSES

In concluding its charge to the Jury on "assessing credibility", the Trial Court stated: "I have told you that assessing credibility is your sole function. You may use whatever yardstick or whatever measuring device you have found effective in the past in determining what credibility you shall assess to witness' testimony." (Tr. 144).

The foregoing instruction has not met with the approbation of this Court. This Court was quite critical of such instruction in the case of "United States vs. Leo Jacobs", No. 22, 336 (Slip Opinion June 25, 1969), ____U.S. App. D.C.____, ____ F.2d ____. In the latter case the Trial Court had delivered the following instruction to the Jury: "Consider all of the evidence that you have heard in the course of this Trial in the light of your own experience as a citizen of the community."

This Court, in the course of its opinion said: "We think the Jury should not be told to consider the evidence in the light of their own experiences as a citizen of this community. This might conjure up varied experiences unknown to the Defense and unrelated to either the weight or credibility of the evidence

adduced at Trial. The Jury should be guided by the rules with respect to reasonable doubt, weight, intent, credibility and other pertinent factors well covered by the Trial Court in this case. To be guided in addition by their own 'experinces as citizens of the community' places at their disposal too vague a standard to follow in their search for the truth in the case on Trial."

The devastating effect of the foregoing charge of the Trial Court in the case at bar is demonstrated by the verdict of the Jury. The Jury was given clearance to "use whatever yardstick or whatever measuring device" they "have found effective in the past in determining what credibility" they "shall assess to a witness' testimony", in determining the guilt or innocence of the Appellant. Such instruction awards to the Jury a diversified standard of assessing credibility of witness, unknown to the Defence and to the prejudice of his right to a fair and impartial trial. Such vagueness constitutes reversible error.

II

THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE LAW OF CIRCUMSTANTIAL EVIDENCE

The argument herein is premised on the proceedings appearing on page 146 of the transcript. There the Trial Court gave the following instruction to the Jury on the issue of "circumstantial evidence": "Circumstantial evidence is testimony as to facts and circumstances which tend to show that the offense charged has been committed. In other words, circumstantial evidence is made up of proven facts which lead to a logical

inference that the offense charged was committed and that it was committed by the Defendant". "Such conclusions may be drawn only if human experience shows that when certain facts are proven certain other results will normally follow." "Both kinds of evidence, have been introduced in this case. Both kinds of evidence are equally entitled to your consideration. Sometimes the Jury may consider this circumstantial or indirect evidence more convincing than direct evidence".

"The rule of law is that whether the evidence be direct, circumstantial, or a combination of the two, before a Jury may find the Defendant guilty in a criminal case it must add up to proof beyond a reasonable doubt." (Tr. 146).

The foregoing instruction is void of any consideration of the "substantial evidence rule", and in this respect it is misleading.

In the case of "Carter vs. United States," 102 U.S. App. D.C. 227, 252 F.2d 608, this Court in reversing the judgment of conviction, among other things, stated: "This Court has held many times that the rule for the Jury is that unless there is substantial evidence of facts which exclude every hypothesis but that of guilt, the verdict must be not guilty. It is not necessary to a verdict of acquittal that on the basis of the facts established, a hypothesis of innocence be as likely as one of guilt; any reasonable hypothesis of innocence must be excluded by the facts".

Thus an analysis of the above opinion of this Court discloses beyond question that the said instruction of the Trial Court in the case at bar is lacking in its failure to embody and expand the "substantial evidence", "exclusion of every reasonable hypothesis but guilt", and "where all of the substantial evidence is consistent with any hypothesis of innocence", Rule.

By reason of the foregoing omissions the instruction as given was incomplete and constitutes reversible error.

III

THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE LAW RELATIVE TO ALIBI DEFENSE AND THE EVALUATION OF ALIBI WITNESSES

In charging the Jury on the issue of alibi defense the Trial Court merely stated that: "There has been testimony to the effect that the Defendant was not present at the time and place when these offenses were committed".

"The defense of alibi is a legitimate, legal and proper defense. The evidence adduced in support of this defense, like all other evidence in the case, should be given such weight and consideration as you may think it entitled to under all the facts and circumstances of the case." (Tr. 153).

In the case of "Goodall vs. United States", 86 U.S. App. D.C. 148, 152, 180, F.2d 397, 401, this Court stated the applicable rule as follows: "There has been testimony to the effect that the Defendant was not present at the time and place when this homicide was committed. The defense of alibi is a legitimate, legal and proper defense. The evidence in support

of this defense, like all other evidence in the case should be given such weight and such consideration as you may think it entitled to under all the facts and circumstances of the case."

"If after a full and fair consideration of all the facts and circumstances in evidence, you find the Government has failed to prove beyond a reasonable doubt that the Defendant was present at the time and place of the commission of the offense charged in the indictment, then one of the essential elements of the offense is lacking, and it will be your duty to find the Defendant not guilty."

In the case of "United States vs. Marcus," 3Cir., 166 F.2d 497 (1948), the Court stated: "By the weight of authority it is held that the instructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, are not enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the Jury with the law that the Government's burden of proof covers the defense of alibi, as well as all other phases of the case.

Proof beyond a reasonable doubt as to alibi never shifts to the accused who offers it, and if the Jury's consideration of the alibi testimony leaves in the Jury's mind a reasonable doubt

as to the presence of the accused, then the Government has not proved the guilt of the accused beyond a reasonable doubt."

It was held in United States vs. Panchella, (E.D. Pa.) 41 F. Supp. 850 (1941), that: "It is equally well settled that, where an alibi defense is presented, a failure, even in the absence of a specific request, to instruct the Jury as to the degree of persuasion required is reversible error, for the reason that the Jury is not furnished with a standard for determining the legal value of the evidence. The Defendant had a right, even though no request was made for the instruction, to have the Jury fully advised as to the difference between the burden resting upon the commonwealth to establish guilt, and that resting on the Defendant with respect to the alibi set up." See, Commonwealth vs. Andrews, 234 Pa. 597, 604, 83A. 412, 414.

In the case of "People vs. Intersimone," 42 N.Y. S.2d 299 (1943), it was held, in the prosecution for assault and the carrying of a concealed weapon, that the refusal of the Trial Court to give requested charge: that the Defense of alibi may of itself create a reasonable doubt notwithstanding the positive testimony of the officer, as to the identification of the accused, was reversible error.

While it is true that the Trial Court further instructed the Jury, in the case at bar that: "If after a full and fair consideration of all the facts and circumstances in evidence, you find the Government has failed to prove beyond a reasonable doubt that the Defendant was present at the time and place of

the commission of the offenses charged in the indictment, then one of the essential elements of the offenses is lacking and it will be your duty to find the Defendant not guilty," (Tr.153), yet the said instruction when considered as a whole, fails to fully charge on the law of alibi defense.

The record before this Court shows that four witnesses testified that the appellant was at premises No. 17 Sherman Circle, N.W. at the time and place of the alleged robberies. It is pointed out in the United States vs. Marcus case, supra, that where the accused produces testimony that he was elsewhere, the Government's burden of proof covers the defense of alibi. That the Jury should be told that the burden of proof beyond a reasonable doubt never shifts to the accused who offers it.

Moreover, the said charge of the Trial Court failed to comport with the holding in United States vs. Panchella, supra, in that it failed to advise the Jury as to the difference between the burden resting upon the Government to establish guilt, and that resting on the Defendant in respect to his alibi defense. Neither does the said charge square with the holding of the New York decision in People vs. Intersimone, supra, in that it failed to inform the Jury that the defense of alibi may of itself create a reasonable doubt notwithstanding the positive testimony of the identifying witnesses.

In the light of the foregoing the Trial Court committed reversible error in its failure to fully instruct the Jury on the law applicable to the defense of alibi.

IV

THE TRIAL COURT ERRED IN ITS REFUSAL TO HOLD A HEARING AND RULE UPON WHETHER A PRE-TRIAL IDENTIFICATION WAS VIOLATIVE OF DUE PROCESS

Counsel for Appellant moved the Trial Court for a directed verdict of not guilty, both at the conclusion of the Government's case in chief and at the conclusion of all the evidence. It was implicit in Appellant's motions that the Government's case was constructed on in-Court identification which was tainted by out-of-Court identification evidence obtained in violation of Appellant's right to constitutional due process.

It is conceded by the evidence that picture identification was employed to initiate the out-of-Court identifications. At the first line-up the complaining witness, Beverley West was unable to identify any one as to the person who had robbed her.

After her failure at identification, she was then taken to number Six Precinct where Officer Smith showed her eight more pictures and at which time she identified one of the pictures, except for the scar on the face of the suspect. As a result of this qualified identification, the said complaining witness was taken to the D. C. Court of General Sessions, where she swore out a warrant, this time, for the arrest of the Appellant. (Tr. 18). The same witness,

Beverley West, testified that the scene of the offense was lit by an arc lamp and that her vision was not blurred at any time. (Tr. 25).

The second complaining witness, Brenda Howard, testified that she was shown eleven pictures on a date that followed the first line-up viewed by Miss West and following Miss West's identification of the same pictures. (Tr. 40 - 41). Miss Howard further testified on cross examination that she knew the Appellant's brother had been in the first line-up, not viewed by her, and further that there was a mix up of the names on the pictures originally viewed by Miss West. (Tr. 42).

Appellant contends that the above information could only have come from the authorities controlling and showing the pictures. Officer Woods who had shown Miss West the first set of fifty pictures, out of which she identified Appellant in the first ten, testified on cross examination that he told the complaining witness that he knew the suspect. (Tr. 49).

Whenever the prosecution proposes to make eyewitness identification a part of its case, the defense is entitled to know, through disclosure by the prosecution or by evidentiary hearing outside the presence of the jury the circumstances of any pre-trial identification.

Where the prosecution intends to offer only an in-Court identification, the defense may challenge its admis-

sibility. The Court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same witness is violative of due process or the right to counsel. Clemons v. United States, 408 F.2d 1230 (1968).

A claimed violation of due process of law in the conduct of a confrontation between the accused and identifying witnesses depends on the totality of the circumstances surrounding it. Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199. Citing United States v. Wade 388 U.S. 218, 18 L. Ed. 2d 1149 and Gilbert v. California, 388 U.S. 263, 18 L. Ed. 2d 1178, the Court in deciding Stovall stated, "Although the Wade and Gilbert rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." The extent to which a condemned practice infects the integrity of the truth determining process at trial is a question of probabilities. Johnson v. New Jersey, 384 U.S. at 728 - 729, 16 L. Ed. 2d at 889. The Trial Court, in denying Appellant a hearing on the identification issue effectively cut off any inquiry into the degree to which or the probability of which the fact-finding process was impaired by the pre-trial identification procedures implemented by the police and

Assistant U. S. Attorney. (Please note that Brenda Howard's photographic identification consisted of eleven pictures, at least two of which were of the Defendant.) (Tr. 55).

Indeed the circumstances surrounding the identification of the Appellant, prior to and at the line-up have induced an identification of the Appellant which was not the product of the complaining witnesses' objective judgment. The Government's capitalization on the same has denied the Appellant due process of law.

In Simmon v. United States, 390 U.S. 377, 17 L. Ed. 2d 1247, the Court discussed at length photographic identifications, saying "Convictions based on eye witness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Court in explaining how the misidentification may come about said "The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictures committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification." In the instant case, where we have three separate

photographic identifications, where a police officer has admitted to the witnesses that he knew defendant, and where the identifying witnesses have certainly compared notes, there is at least a minimum suggestiveness created by the pictures.

The Court has been mindfull of the hazards inherent in the use of photographs for purposes of identification. United States v. Hamilton, No. 22, 361 (D.C. Cir. July 24, 1969) at 5. In Hamilton the initial observation of the suspect was under well lighted circumstances and this Court stated; where it is not, "even if the police subsequently follow the most correct photographic identification procedures . . . there is some danger that the witness may make an incorrect idnetification." Such a danger -- always a matter of degree related to the circumstances may be reduced by controls on the number and types of photographs used, the physical characteristics of the individuals depicted, and the recurrence of the same photographed subject. But a danger of erroneous conviction lurks also in the possible inability of the accused to reconstruct the pictorial display -- and consequently any unfairness in it -- to which an identifying witness has been exposed. Ibid. In the instant cause, although there is indication that the above controls were not used, there was allowed no hearing on the admissibility of identification evidence.

Here, the pre-trial identification of the appellant

has so tainted and poisoned the in-Court identification, until a new trial for the purpose of affording the Government an opportunity to establish "by clear and convincing evidence" an independent in-Court identification, is practically an impossibility.

CONCLUSION

In the light of the authorities cited, and the reasons advanced hereinabove, the Appellant urges the Court to reverse the judgment of conviction entered below, or in the alternative, remand the case for a new trial with instruction to exclude from the Government's identifying witnesses, all such witnesses who testified at the trial, as to the out-of-court and in-court identification of the Appellant.

Respectfully submitted,

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